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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 209

EMICH MOTORS CORPORATION AND U. S. ACCEPTANCE CORPORATION,

Petitioners,

vs.

GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondents.

REPLY OF PETITIONERS TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR REHEARING AND SUPPLEMENT THERETO.

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Dated: November 9, 1950.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

IN THE

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OCTOBER TERM, 19[illegible].

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In attempting to refute petitioners' showing that it is a practical impossibility to retry the instant case, respondents say petitioners could have controlled the length of the defense by curtailing cross-examination. They do not suggest, however, any means whereby petitioners or the trial court can limit the number of defense witnesses which, under the trial court rulings, reached the huge total of 204, and which, under the expanded evidentiary frontiers envisaged by the Court below, unquestionably would become many times greater, at the pleasure of respondents.

Considering that the cross-examination brought key defense witnesses of the calibre of Alfred P. Sloan, Jr., from a blanket assertion of innocence to the point of admitting that the deliberate policy of respondents was to coerce the dealers to abide by the GMAC plan (note Sloan's words "require", R. 3868, 3878, 3887; "must conform", R. 3894, "had to use", R. 3895); considering, further, that cross-examination brought respondents' accounting expert, a partner of Arthur Andersen & Co., to confess that his testimony was "wrong" and "false" (R. 3922-3926, 4024-4030)—it is apparent that curtailment of cross-examination could have occurred only at the expense of the truth, as found by the jury.

The facts of record belie respondents' assertion that they did not prolong the trial in order to win by attrition. At the beginning of the trial, respondents forecast it would last three or four weeks in total (R. 7278). After the first week of the defense on November 21, 1947, respondents said they needed about three weeks more (R. 2201). On November 25, petitioners, observing that the defense up to that time was to pin-point and recklessly deny each and every matter down to the merest collateral detail, expressed alarm that a continuation of this strategy would consume as much as sixty days more (R. 2310). On December 9, when the three-week period previously estimated by respondents was about to expire, they said they required another two weeks (R. 3204). Petitioners challenged this as an obvious misrepresentation, because the type of defense being waged inevitably would carry the case at least to the end of January (R. 3205). On January 5, 1948, respondents persisted in their pretense by asserting they would finish "about the middle of next week" (R. 3919). One week later, on January 12, the last alternate was sworn as a juror (R. 4366). Up to this time, most of the major defense witnesses had not yet been called.

Thereafter, the defense ran for five more weeks. On January 20, still not willing to attribute improper motives to respondents, the exceedingly patient trial judge made the remarks from which respondents take comfort, to the effect that the case was not being unjustifiably prolonged (R. 4987-4988). But after another two weeks and one thousand pages of printed record, the trial judge, on February 4, began to exert pressure to bring the defense to an end (R. 5979-5980, 6970). Two more weeks and another thousand pages of the printed record elapsed before the defense finally rested, on February 18, months beyond respondents' original estimates and six weeks after the last alternate juror was sworn and the danger of a mistrial through disintegration of the jury became imminent.

In attempting to distinguish the case of *Kiefer-Stewart Company* v. *Joseph E. Seagram & Sons, Inc.*, October Tm., 1950, No. 297, which this court has undertaken to review, respondents contend that, in the instant case, the excluded offers concerning alleged overcharges were designed to prove actual defrauding of installment customers and not merely the imposition of charges over and above the maximum prescribed under the GMAC plan. In making this contention, respondents rely principally upon their Exhibit 173 for identification and the offer through Stapleton, the spuriousness and frivolity of which were previously exposed (Petn. for Cert., pp. 38-41; Reply Bf. of Petitioners, pp. 3-6). Respondents' claim to the contrary notwithstanding, neither of these offers is capable of proving fraud. The indispensable ingredient of fraud is misrepresentation, and neither of these offers purport to say that any misrepresentations were made to customers, merely that petitioners' finance charges were not standardized and were higher than the so-called 6% maximum originated by GMAC.

In order to create the impression that misrepresenta-

tions of finance rates were made to customers, respondents suggest that petitioners showed a rate chart to the customer and then, without his knowledge, charged him more than appeared on the chart (Resp. Reply to Mo. for Leave to File Supp., p. 3). Not only was there nothing in the record to bear this out, but it is directly contrary to the testimony of respondents' own finance expert that "these rate cards were not available to the public" and that it was because of this fact that GMAC originated and publicized the 6% plan to enable the customer to determine and compare the charges for himself (R. 3124).

The record shows indisputably that respondents had free rein in the production of evidence of alleged fraud and that they introduced such trivial evidence as they had (Appendix to Petn. for Cert., pp. x-xi; R. 4941, 5317, 4939, 4776, 6456, 6458). Respondents evinced a complete understanding and working knowledge of the fact that the exclusionary rulings pertained only to evidence of alleged overcharges apart from fraud. As stated by defense counsel Boone:

> "* * * Then there is another type of complaint of the witness who contends he was overcharged on his financing. Your Honor has clearly ruled that out, and we have made several offers of proof with respect to that.
>
> "There is another type of witness who says that Emich misrepresented the finance plan to him. * * * Your Honor has admitted those." (R. 6458.)

What respondents are attempting to do here is to mislabel and misdescribe the excluded offers as though they too bore on fraud. This is done to obscure the vital fact that the only evidentiary value in the excluded offers was to show that the reason for the cancellation of Emich Motors' dealerships was the latter's refusal to abide by the maximum installment resale prices fixed by respondents.

Whether companies may combine to cut off a dealer for such a reason is the precise question which is to be reviewed in the *Kiefer-Stewart* case.

Respectfully submitted,

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